Nos. 18-422, 18-726

IN THE

# Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

*Appellants,*

*v.*

COMMON CAUSE, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

*Appellants,*

*v.*

O. JOHN BENISEK, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

## BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES


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## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICI CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 5

ARGUMENT ..... 7

I. EXTREME PARTISAN GERRYMANDERING UNDERMINES THE HEALTHY FUNCTIONING OF THE HOUSE ..... 7

A. Partisan Gerrymandering Subverts Traditional Districting Criteria ..... 7

B. Partisan Gerrymandering Devalues Pragmatic Problem-Solving And Constituent-First Representation In The House ..... 11

1. Partisan gerrymandering creates artificially uncompetitive districts ..... 12

2. Partisan gerrymandering enhances the influence of political parties at the expense of independent-minded Members and the constituents they serve ..... 17

3. Partisan gerrymandering harms the House as an institution ..... 18

C. Extreme Partisan Gerrymandering Hurts The People Themselves ..... 22

**TABLE OF CONTENTS—Continued**

Page

II. EXTREME GERRYMANDERING IS INCONSISTENT WITH THE NATURE OF REPRESENTATION IN OUR FORM OF GOVERNMENT ..... 25

A. Members Of The House Are Direct Representatives Of The People ..... 25

B. Extreme Gerrymandering Distorts The People's Voice In Contravention Of The Framers' Vision ..... 28

III. RECOGNIZING BASIC LIMITS ON EXTREME PARTISAN GERRYMANDERING IS APPROPRIATE AND CONSISTENT WITH THE COURT'S ROLE IN OUR CONSTITUTIONAL ORDER ..... 30

A. Extreme Partisan Gerrymandering Represents A Breakdown In The Political Process ..... 31

B. Basic Limits Are All That Is Needed To Resolve The Breakdown ..... 34

CONCLUSION ..... 35

## TABLE OF AUTHORITIES

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Page(s)

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U.S. Const.
Preamble ..... 26
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## BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

## INTEREST OF AMICI CURIAE[1]

Amici curiae are current and former Members of the House of Representatives from both major political parties—20 Republicans and 20 Democrats. Amici hail from over 20 States, representing every corner of our Nation: from Florida to Maine; from the Great Lakes to the Great Plains to the West Coast and in between. Despite many political and regional differences, amici are united in the belief that, in our system of government, power flows from the People to their political representatives and not the other way around. Amici are equally united in the belief that removing the most extreme forms of partisan manipulation from the legislative redistricting process is essential to ensuring principled and constituent-first representation.

Amici understand the nature of the redistricting process from first-hand experience. They know what it means to represent the people of a community in what Madison called the "popular branch" of our federal government, and they have seen first-hand how districting decisions affect the incentives a Member experiences. Amici hope that by describing their experiences they will help the Court understand why basic, enforceable constitutional limits on extreme partisan gerrymanders will make Congress better serve the People and thus more faithfully fulfill its constitutional role.

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made any monetary contribution to its preparation and submission. All parties have filed blanket consents with the Court.

Amici are the following Members and former Members of the U.S. House of Representatives, in alphabetical order:

1. Rep. Mark Amodei (R-Nev.)
2. Rep. Don Beyer (D-Va.)
3. Fmr. Rep. Rod Blum (R-Iowa)
4. Rep. Earl Blumenauer (D-Or.)
5. Rep. Brendan Boyle (D-Penn.)
6. Fmr. Rep. William Brock (R-Tenn.)
7. Fmr. Rep. Russ Carnahan (D-Mo.)
8. Fmr. Rep. Mike Castle (R-Del.)
9. Fmr. Rep. William Clinger (R-Penn.)
10. Rep. Jim Cooper (D-Tenn.)
11. Fmr. Rep. Carlos Curbelo (R-Fla.)
12. Rep. Ted Deutch (D-Fla.)
13. Fmr. Rep. Vic Fazio (D-Cal.)
14. Rep. Brian Fitzpatrick (R-Penn.)
15. Fmr. Rep. Dan Glickman (D-Kan.)
16. Rep. Josh Gottheimer (D-N.J.)
17. Rep. Raul Grijalva (D-Ariz.)
18. Fmr. Rep. Richard Hanna (R-N.Y.)
19. Rep. Andy Harris (R-Md.)
20. Fmr. Rep. David Jolly (R-Fla.)
21. Rep. Marcy Kaptur (D-Ohio)
22. Rep. Dan Kildee (D-Mich.)
23. Rep. Peter T. King (R-N.Y.)

24. Fmr. Rep. Steven Kuykendall (R-Cal.)
25. Fmr. Rep. Larry LaRocco (D-Idaho)
26. Rep. Dave Loebsack (D-Iowa)
27. Rep. Alan Lowenthal (D-Cal.)
28. Fmr. Rep. Pete McCloskey (R-Cal.)
29. Rep. Greg Meeks (D-N.Y.)
30. Fmr. Rep. Connie Morella (R-Md.)
31. Rep. Chellie Pingree (D-Maine)
32. Rep. Tom Reed (R-N.Y.)
33. Fmr. Rep. Claudine Schneider (R-R.I.)
34. Fmr. Rep. Chris Shays (R-Conn.)
35. Fmr. Rep. Peter Smith (R-Vt.)
36. Fmr. Rep. Olympia Snowe (R-Maine)
37. Rep. Thomas Suozzi (D-N.Y.)
38. Fmr. Rep. Richard Swett (D-N.H.)
39. Fmr. Rep. Zach Wamp (R-Tenn.)
40. Fmr. Rep. Lynn Woolsey (D-Cal.)

## INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, addressing an annual gathering of the Republican Governors Association, President Ronald Reagan decried partisan gerrymandering. President Reagan explained that what the country needed was "an end to the antidemocratic and un-American practice of gerrymandering congressional districts."[2] He was right. Yet, three decades later, amici and their constituents continue to experience the corrosive effects of partisan gerrymandering. Since President Reagan's call to action, both major political parties have used partisan gerrymandering with ever-greater frequency and efficiency, hurting voters of all stripes and undermining faith in our institutions of government. Amici therefore believe that the need is greater than ever to enforce basic constitutional boundaries on the worst forms of partisan gerrymandering.

This brief makes three overarching points.

*First*, extreme partisan gerrymandering harms our political system, and harms the functioning of the House of Representatives in particular. It puts raw partisan position ahead of the maintenance of coherent political communities and sensibly shaped districts based on traditional districting criteria. A cascade of negative results follows: artificially drawn "safe" districts tend to make general elections less competitive and give party insiders, or small groups of "base" primary voters, much greater influence than the general electorate; political parties gain power to obstruct independent, constituent-first representation; compro-

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[2] Reagan, Remarks at the Republican Governors Club Annual Dinner (Oct. 15, 1987).

mise becomes politically impossible even when Representatives on both sides of the aisle share areas of principled agreement and even when the voters want it; and the People grow frustrated with the capacity of the House to govern effectively, causing disillusionment with and disengagement from our democratic processes.

*Second*, extreme partisan gerrymandering cannot be reconciled with the Framers' conception of the House of Representatives as directly accountable to the People. The premise of extreme partisan gerrymandering is that politicians choose their voters rather than voters choosing their representatives. That stands on its head the Framers' understanding that the House was to be the institution most directly connected to and representative of the People themselves.

*Third*, this Court has a crucial role to play in fixing the problem. The cycles of extreme partisan gerrymandering are self-perpetuating, with partisanship and mistrust begetting still greater partisanship and mistrust. This Court's role in our constitutional order includes safeguarding the fundamental predicates of the political process when necessary. The modicum of judicial involvement required here—recognizing basic constitutional safeguards against the worst partisan gerrymanders—will allow the political process to begin to correct itself. Such involvement is fully consistent with the Court's constitutionally assigned role.

Partisan gerrymandering makes it more difficult for Members to do the one job voters expect above all: delivering results for their constituents. We can and must do better.

## ARGUMENT

### I. Extreme Partisan Gerrymandering Undermines The Healthy Functioning Of The House

Members of the House must be free above all else to follow the desires of their constituents. But partisan gerrymandering creates obstacles to that fundamental pursuit. It subverts traditional districting criteria that tie members to coherent political communities. It undercuts the types of principled, bipartisan or nonpartisan cooperation that most voters crave. And it makes the People feel like their government is rigged against them.

#### A. Partisan Gerrymandering Subverts Traditional Districting Criteria

Traditional districting principles, such as compactness, regularity, and maintenance of communities of interest, have long played a critical role in fostering coherent political communities with shared identities, concerns, and interests. *See, e.g.*, *Evenwel* v. *Abbott*, 136 S. Ct. 1120, 1124 (2016). Extreme partisan gerrymandering subverts these traditional principles and the local identities and communities they respect and promote. By definition, the dominant consideration in a partisan gerrymander is benefit to the party drawing the lines, even at the expense of the needs of existing communities.

Traditional districting principles help ensure that districts have coherent geographic and political identities, and thus help maintain a deep connection between a Member and his or her constituents. As Representative Scott Tipton, Republican of Colorado, has explained, it is important for a district to have coherent identity. Discussing his district, Representative Tipton said that issues affecting the state's rural communities,

such as water issues, give his district a common language and an "essence."[3] Representative Tipton credits the strong identity of his district as encouraging political competition and warding off needless partisanship. In Colorado's Third Congressional District, he explained, "we've elected Republicans, we've elected Democrats." "[I]rrespective of ... heritage," "irrespective of geography," "irrespective of party[:] we elect the person."[4]

Traditional districting criteria also aid effective representation by helping Members work more effectively with local officials in serving their constituents.[5] In Colorado, that might mean working with county governments, which administer major federal programs such as Medicaid and food stamps.[6] In other States, those principles might ensure strong relationships with the cities and towns that are included within a Member's district.

Without constitutional limits on partisan gerrymandering, traditional districting principles can be subverted whenever a single political party gains control of the redistricting process and seeks to maximize its political advantage no matter the cost. *See, e.g.*, *League of United Latin Am. Citizens* ("*LULAC*") v. *Perry*, 548 U.S. 399, 481 (2006) (Stevens, J., concurring in part and dissenting in part) (political gerrymander-

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[3] Tr. of Testimony of Rep. Scott Tipton ("Tipton Tr.") 1321, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 17, 2011).

[4] *Id.* at 1334, 1338.

[5] *E.g.*, Tr. of Testimony of Rep. Michael Coffman (R-CO) 2573-2574, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 21, 2011).

[6] *Id.* at 2572.

ing "subordinate[s] traditional politically neutral districting principles ... to political considerations." (original brackets omitted) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995))). A map drawn solely to achieve partisan ends undermines the benefits that come from compact districts that respect existing geographic and political boundaries such as county lines.

Consider, for example, Representative John Shimkus, Republican of Illinois. The 2011 redistricting process dramatically changed his district. Representative Shimkus's hometown of Collinsville, with a population of just 25,000, was divided among three congressional districts.[7] And the area of his district was massively expanded to include all or part of *33 counties*. This geography makes it much more difficult for Representative Shimkus to interact with constituents across the district—nearly impossible, for example, to hold town halls in every community across the district in the same way that he could in a district that was drawn using traditional principles.[8]

Or consider amicus Representative Andy Harris, Republican of Maryland. Representative Harris's district had long been centered on Maryland's Eastern Shore, a coherent geographic, economic, and cultural region defined by the Chesapeake Bay, which separates it from the rest of the state. In 2010, as part of a map

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[7] Pearson, *House Members Blast Illinois' New District Map in Court*, Chi. Trib. (Nov. 18, 2011).

[8] *See also* Steinhauer, *Hello, Illinois? Your Congressman Is Getting Off the Phone*, N.Y. Times (Apr. 24, 2012) (former Rep. Tim Johnson (R-IL) lamenting that Illinois' "grossly gerrymandered congressional map" would have forced him into a district in which "two-thirds of the voters have never been represented by" him).

that was later challenged in one of the cases now before the Court, 135,000 people from areas on the Bay outside of Annapolis and Baltimore were pulled out of the district and replaced by about 115,000 people in north central Maryland, a landlocked area on the other side of Baltimore along the Pennsylvania border. This change served partisan ends—*i.e.*, packing a higher percentage of Republican voters into Representative Harris's district—by diluting the district's coherent, Eastern-Shore-based identity.[9]

Districting changes that interfere with the relationships between Members and the communities they serve are not fair to anyone—and especially not to the voters.[10]

Traditional districting considerations are meant to reinforce the role of representatives as leaders in and members of particular political and geographic communities. That is how representation works best in our democracy. As Madison wrote, a Representative should possess "a local knowledge of their respective districts" and remain "acquainted with the interests and circumstances of his constituents." Federalist No. 56. Representative Tipton echoed that idea in discuss-

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[9] Johnson, *Is This How Maryland's 3rd Congressional District is Supposed to Look?*, Wash. Post (Sept. 21, 2014).

[10] Partisan gerrymanders also frequently lead to incumbents running in what are effectively new districts drawn with no particular goal beyond partisan ends. Sometimes that means that two incumbents' districts have been smashed together, eliminating established political communities and forcing experienced Representatives to run against one another. *See* Iyer, *Redistricting and Congressional Control Following the 2012 Election*, Brennan Center for Justice (Nov. 28, 2012) (finding that, in 2012, 40 incumbents, evenly split by party, left office at least in part due to districting changes).

ing how he got into politics. He was taught that there is a "public responsibility to participate," which means citizens going to "precinct caucuses and county assemblies, because that's how the process works. You had an opportunity to be able to see who was going to cast your vote in the state legislature and Congress and the city council."[11]

Traditional districting principles reflect that sense of participation and community identity. But extreme partisan gerrymanders sacrifice those values in favor of whatever map will most benefit the party in power.[12]

### B. Partisan Gerrymandering Devalues Pragmatic Problem-Solving And Constituent-First Representation In The House

Extreme partisan gerrymandering also rewires a district's internal political dynamics—pushing Members towards the ideological poles, encouraging Members to eschew principled, bipartisan compromise, and transferring power from voters to political parties. These shifts undercut the cardinal rule of serving as a representative of the People: Standing with one's constituents, regardless of the partisan calculus.

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[11] Tipton Tr. 1315.

[12] As Representative Rodney Davis (R-IL) has explained, extreme partisan gerrymanders make it unnecessarily difficult to "form districts that better reflect the interests of [the] citizens." Press Release, Rep. Alan Lowenthal, *Congressman Lowenthal Leads Bipartisan Amicus Brief to Supreme Court Defending Voters' and States' Rights* (Jan. 26, 2015).

### 1. Partisan gerrymandering creates artificially uncompetitive districts

One of the most baleful consequences of extreme gerrymandering is that it entrenches "safe" districts, that is, districts in which general elections are rendered uncompetitive due to partisan line-drawing. This is achieved through "packing" a disfavored party's supporters into a small number of districts, thus creating majorities for the dominant party in many or all of the remaining districts and thus "cracking" the disfavored party's support in those districts. Regardless of the statewide totals, the line-drawing party can use these techniques to make itself the presumptive victor in a majority of the state's districts. As a result, as amicus former Representative Rod Blum, Republican of Iowa, explained, in the 2016 election cycle "you probably ha[d only] 25-35 congressional districts that [we]re actually competitive."[13] Amica former Senator and Representative Olympia Snowe, Republican of Maine, was even more pessimistic in advance of the 2014 elections, explaining that "as few as seven seats are considered to be tossups in this election" due largely to partisan gerrymandering.[14]

Representatives Mike Gallagher (R-WI) and Ro Khanna (D-CA) have explained that politicians should not be "allowed to gerrymander their districts and choose their own voters" in this manner precisely because "[t]he less competitive a district becomes, the

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[13] Burke, *Rep. Rod Blum: I'll Walk the Walk on Term Limits*, Newsmax (May 29, 2015).

[14] Fleury & Wright, *A Chat With Olympia Snowe*, Downeast (Oct. 2014).

more general elections become formalities."[15] In a "safe" district, with the general election result foreordained, the focus of political activity shifts to the primary election of the dominant party. Power thus shifts from the general electorate to party insiders with influence over the nomination process and to lower-turnout primary elections that principally attract a relatively small number of "base" voters.[16] As a result, as amicus Representative Earl Blumenauer (D-OR) explained in an op-ed with then-Representative Jim Leach (R-IA), "[p]rimary elections in districts that are overwhelmingly Republican produce candidates generally to the right of the average Republican, while more liberal Democrats usually emerge from primaries in districts that are overwhelmingly Democratic."[17]

The elevation of primaries over the general election can effectively make Representatives responsive to a minority rather than a majority of voters in their districts. As Representatives Darin LaHood (R-IL) and Dan Lapinski (D-IL), explained in 2017, "as a result

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[15] Gallagher & Khanna, *Two congressmen offer a bipartisan plan to 'drain the swamp'*, Journal Sentinel (June 1, 2017).

[16] *See* Tarr & Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("Rather, legislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system.").

[17] Blumenauer & Leach, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003); *see also, e.g.*, Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1068 (2005) ("[P]oliticians who are elected to office only have to cater to voters from one party, and such politicians—either out of conviction or out of political prudence—tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected.").

of years of gerrymandering congressional districts, some of our elected public servants are winning their offices by a minority of a minority of a minority."[18] This dynamic can change Members' political incentives. A Member in a "safe" district has strong incentives to appeal to party insiders, or to highly partisan primary voters who hold the key to re-election. As Representative David Price (D-NC) noted, those incentives "really affect[] the way members behave once they come [to Congress]. I've heard some guys say they might be more moderate, but they just can't be .... It all adds up to pretty extreme behavior. The gerrymandering really exacerbated that."[19]

The result is a phenomenon that amici see all too often: intense pressure to be driven by partisanship over all other considerations, leaving more moderate voters—voters from the party that drew the district lines, independent voters, *and* voters from the disfavored party (including those who could have been cross-over voters)—feeling voiceless and unrepresented in the House.[20] Amicus Representative Jim Cooper

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[18] *Congress of Tomorrow Project - Introduction*, Congressional Institute.

[19] Grossman, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate (Mar. 20, 2017).

[20] This Court has recognized a similar dynamic in the context of racial gerrymandering. *Cf. Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) ("When a district obviously is created solely to effectuate the perceived common interests of one [] group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."). So have prominent legal scholars. *See* Levinson & Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2335 (2006) ("The absence of a general election

(D-TN) laid bare the broad scope of the problem: Gerrymandering, he explained, "is not only unfair to independent voters, but *all voters*, because it creates a Congress of highly-partisan representatives when most Americans are centrists."[21]

Competitive districts, by contrast, tend to produce more constituent-centered representation. A competitive district, as Representative David Joyce (R-OH) has explained, "forces you to evaluate each piece of legislation and not just answer to the fringes of the parties."[22] Winning in a politically competitive district demands that Members actively engage with, and craft policy positions designed to help, a broad cross-section of their constituents from across both parties.[23] Former Representative Steve Pearce, also a Republican, noted that representing his competitive New Mexico

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threat enables party activists, who turn out in disproportionate numbers in primary elections and whose views typically reflect the extremes of the party's support, to select more partisan primary winners."); *see also* Tarr & Williams, *Introduction*, 37 Rutgers L.J. at 878 ("Partisan gerrymandering encourages extreme partisanship and extreme positions.").

[21] Press Release, Rep. Jim Cooper, *Cooper, Tanner Work to Stop Gerrymandering* (Apr. 21, 2010) (emphasis added).

[22] Akron Beacon Journal Staff, *Ohio's 14th Congressional District race: Andrew Jarvi, Dave Joyce, Michael Wager*, Akron Beacon Journal (Oct. 19, 2016).

[23] *See* Adams, *Toward a System of "Fair and Effective Representation": A Common Cause Report on State and Congressional Reapportionment* 24 (1977) ("Safe districts remove the incentive to grant political concessions to constituent interests ... or create electoral coalitions [that] ensure representation of diverse points of view."); Raviv, *Unsafe Harbors*, 7 U. Pa. J. Const. L. at 1068 (arguing that safe districts encourage polarization in decisionmaking bodies).

district meant he needed to "talk to a lot of Democrats" and to "go into areas that have never seen a Republican."[24] In those more competitive districts, Members must actively work to represent their whole constituency, and citizens reciprocate with more robust civic engagement.

For those same reasons, Members from more competitive districts are also freer to drive efforts to develop pragmatic results for constituents. Amici Republican Representative Tom Reed of New York and Democratic Representative Josh Gottheimer of New Jersey, for example, co-chair the Problem Solvers Caucus, which, as its name suggests, is designed to overcome partisan polarization and deliver practical solutions for the American people.[25] Similarly, amicus former Republican Representative Carlos Curbelo co-chaired the bipartisan Climate Solutions Caucus, which explores policy solutions designed to address the impacts of our changing climate, with his fellow amicus Florida Democratic Representative Ted Deutch.[26]

Representative Will Hurd (R-TX) perhaps best summed up the benefits of competitive districts in July 2017 when he said: "My district is competitive, and

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[24] Hayden, *Pearce talks endangered species, Trump*, Carlsbad Current-Argus (Aug. 18, 2016).

[25] *See* Marcos, *Lawmakers set up bipartisan Problem Solvers Caucus for new Congress*, The Hill (Feb. 3, 2017).

[26] Press Release, Rep. Carlos Curbelo, *Curbelo, Deutch Welcome 50 Members to Bipartisan Climate Solutions Caucus* (July 25, 2017) https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1603.

that's a good thing ... because it forces people to talk to a broader sense of the community[.]"[27]

### 2. Partisan gerrymandering enhances the influence of political parties at the expense of independent-minded Members and the constituents they serve

Unfettered partisan gerrymandering also alters the dynamic between Members and their political parties. Power shifts to party insiders, who dictate the literal party line and demand that Members abide by it, irrespective of the preferences of a Member's constituents. If an independent-minded Member breaks with his or her party in order to follow the wishes of constituents, party insiders can use the next redistricting process to make re-election difficult for that Member or eliminate his or her seat altogether. This power dynamic distorts the proper functioning of the House and makes it less responsive to the People.

In amici's experience, if partisan gerrymandering remains unchecked, party insiders will use the redistricting process to threaten or punish independent-minded Members. For example, in 2011, Representative Jim Jordan (R-OH) was threatened with the erasure of his district by party officials after he took independent stands.[28] In the case of Representative Justin Amash (R-MI), the party actually did redraw his district in an unsuccessful attempt to thwart his re-

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[27] Stewart, *Hurd Defends District Lines in Court*, Roll Call (July 17, 2017).

[28] Joseph, *Jordan in redistricting crosshairs after bucking Boehner*, The Hill (July 28, 2011).

election because of commitment to faithfully representing constituents independent from party dictates.[29]

Using the redistricting process to pick winners or enforce internal party discipline is anathema to Members' faithful and independent representation of voters' interests. As Freedom Caucus co-founder Representative Mark Meadows (R-NC) has emphasized: "There should never be a punishment for voting the will of the people. ... To do otherwise would be to be putting party over people, and most Americans have a strong distaste for that."[30]

### 3. Partisan gerrymandering harms the House as an institution

More artificial "safe" seats and greater party influence over the districting process have helped produce an unprecedented rise in partisanship in the House. Partisan grandstanding and unprincipled obstruction reign supreme while independent-minded, results-oriented representation suffers.[31]

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[29] Harger, *Is the GOP throwing Justin Amash under the bus?*, Michigan Live (June 24, 2011); *see also* Amash, Twitter (May 25, 2017) ("Gerrymandered by Republicans and the Michigan Chamber of Commerce to prevent my re-election. It didn't work.").

[30] Israel, *A Matter of Principles: Mark Meadows Speaks Conservatism*, Mida (July 2, 2017).

[31] *See generally* Mann & Ornstein, *It's Even Worse Than It Looks* (2012) (discussing the rise of hyper-partisanship and "vehemently adversarial" politics); Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005) (discussing effects of "excessive partisanship"); Issacharoff & Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004) ("The result is not only less electoral accountability

Amici know that there are areas where Members from different parties share common ground notwithstanding their deeply held beliefs. But even on issues where bipartisan agreement exists, the "play-to-the-base" and "tow-the-party-line" dynamics that partisan gerrymandering encourages often cause Members to leave common-sense policy solutions on the table. Some deem it more advantageous to attack the other side in the media rather than sit down, grapple with real differences, and explore areas of genuine common ground that exist.[32] The bottom line, as amicus former Representative Zach Wamp, Republican of Tennessee, explained, is that, "[a]s the political lines become more skewed, successful candidates are increasingly more interested in political rhetoric than solutions and serving the public."[33]

Amici can attest that the dynamics that flow from hyper-partisan gerrymandering contribute to the growing partisan rancor in the House. As amicus Representative Blumenauer and former Representative Leach have explained, as a result of gerrymandering,

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but also more fractiousness in government and more difficulty in forming legislative coalitions across party lines.").

[32] *See* Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 306-307 (1991) ("[T]he beneficiaries of gerrymanders ... are also less needful of being near the political center of their districts. They are, in brief, more likely to be ideologues"); Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, 430 (2004) (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party").

[33] Hill Staff, *Wamp backs Dem redistricting plan*, The Hill (June 23, 2005).

"Members are less inclined to talk and cooperate, much less compromise," and "[t]he legislative agenda is shaped more to energize the political base than to advance the common good."[34] For Members who occupy artificial "safe" seats, the dynamics described above can apply with particular force. And even for Members who are not directly subject to such electoral disincentives, compromise is more difficult in an environment where there are no limits to the pursuit of partisanship in the shaping of electoral rules. Members who want to work from a position of principled independence have fewer potential partners on the other side.

Perhaps the saddest aspect of this dilemma is that, as amici know well, lack of cooperation begets distrust, which only further erodes the potential for cooperation. Members who strike a difficult bargain on one issue develop trust that then allows them to work together again—seeking out other areas where cooperation can lead to common-sense solutions to the problems our Nation faces. In earlier, less hyper-partisan eras, the result was a virtuous cycle of building trust. In today's climate, a vicious cycle predominates, fostered in substantial part by extreme partisan gerrymandering.

None of this is to suggest that Members should reflexively embrace bipartisanship for its own sake. Members of Congress can, will, and should hold principled beliefs that simply are not up for compromise. What matters is that Members are guided *only* by *their* judgment about how to deliver solutions for *their* constituents. When serving one's constituents calls for toeing the party line, a Member should do that; likewise, when serving one's constituents calls for working towards a bipartisan compromise, a Member should do

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[34] Blumenauer & Leach, *Redistricting*, *supra*.

that too. The problem with partisan gerrymandering is that it encourages partisanship for its own sake. That, amici strongly believe, is something no Member should feel compelled to embrace.

The effects of extreme partisan gerrymandering harm the House as an institution. The dramatic increase in partisanship in recent years has been accompanied by an equally dramatic decrease in major bipartisan legislative accomplishments that leaders on both sides of the aisle were able to forge throughout much of the 20th Century. As amicus Representative Brian Fitzpatrick, Republican of Pennsylvania, has explained, "[p]artisan gerrymandering has exacerbated electoral complacency ... and contributed to the growing divide of partisanship that grinds the gears of government to a halt."[35] The overall productivity of the House has declined as a result, diminishing the House's role in our government.

Virtually no one who has served in Congress actually supports limitless, unchecked partisanship in the districting process. Even former Speaker of the House Newt Gingrich has candidly acknowledged that, with extreme partisan gerrymandering, each party "get[s] to rip off the public in the states where they control," but "the public gets ripped off in [all] circumstances."[36] According to Gingrich, "[i]n the long run, there's a downward spiral of isolation."[37] On that point, amici all

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[35] Ripon Advance News Service, *Fitzpatrick leads bipartisan resolution calling on House to end political gerrymandering*, The Ripon Advance (May 11, 2017).

[36] Eilperin, *The Gerrymander That Ate America*, Slate (Apr. 17, 2006).

[37] *Id.*

agree: When partisan gerrymanders devalue general elections and encourage partisan grandstanding for the base over independent judgment or delivering results for constituents, we all lose.

### C. Extreme Partisan Gerrymandering Hurts The People Themselves

The reduction in constructive dialogue among Members and the increased perception that general election outcomes are foreordained cause voters of all stripes to lose faith in the electoral process. As one bipartisan commission including a number of distinguished former Members explained: "Th[e] overtly political [districting] process sows distrust among the electorate about the fairness of the districts as drawn and adds to the rancor between the political parties when one feels that the other is assigning lines that disadvantage their political opponents."[38]

As more and more elections become reserved to those core partisans who tend to vote in party primaries, many other citizens increasingly view their votes as hollow gestures.[39] Voters understand when, as amicus Representative Harris has explained, a districting

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[38] Bipartisan Policy Center, Commission on Political Reform, *Governing in a Polarized America* 30 (2014).

[39] Potter & Viray, *Barriers to Participation*, 36 U. Mich. J.L. Reform 547, 575 (2003) (electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process" but "[i]t stands to reason that voter turnout decreases when voters feel that their votes are inconsequential. This would occur most often when the outcome of an election appears so clearly predetermined as to make the election a formality.").

map is "not fair to citizens throughout the state."[40] Gerrymandered seats lead voters to feel left out of the conversation entirely.[41]

As a result, faith in the integrity of elections has dropped precipitously in recent years. The Gallup Poll found that between 2009 and 2016, the percentage of Americans who "have confidence" in the "honesty of elections" tumbled from 59 percent to 30 percent, while those lacking faith rose from 40 percent to 69 percent.[42] A November 2013 poll found that 64 percent of respondents (including a majority of Republicans, Democrats, and Independents) believed that the redrawing of districts is often used to take power away from voters.[43]

In light of these trends, proposed electoral reforms, such as the introduction of independent or bipartisan redistricting commissions, have proven increasingly

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[40] Zheng, *Reform seeks public input on redistricting in Md.*, WMDT (Nov. 1, 2016).

[41] *See generally* Issacharoff & Karlan, *Where to Draw*, 153 U. Pa. L. Rev. at 574 ("Noncompetitive elections threaten both the legitimacy and the vitality of democratic governance"); *see* Cox, *Partisan Gerrymandering*, 2004 Sup. Ct. Rev. at 433 n.66 (discussing how efforts to gerrymander may cause the public "to see the political process as somehow less legitimate and thereby skew the incentives to participate").

[42] *See* Gallup, *Update: Americans' Confidence in Voting, Election* (Nov. 1, 2016). This rapid shift can be attributed only in part to the highly partisan 2016 presidential election. As early as 2014, 59 percent of Americans said they lacked confidence in the honesty of elections, while only 40 percent held such confidence—a mirror image of the poll results from 2009. *Id.*

[43] *See* The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013).

popular with voters across the political spectrum. In the most recent midterm elections, for example, voters in Michigan, Missouri, and Colorado overwhelmingly passed ballot initiatives aimed at districting reform.[44]

Amici embrace the States' role as laboratories for redistricting reform. But amici also know that enacting redistricting reform can be exceedingly difficult when one party controls the machinery of the districting process. In Illinois, voters have sought an amendment to the state constitution that would prevent any districts that are "drawn to purposefully or significantly discriminate against or favor any political party or group, and not considering the residence of any person."[45] The dominant political party in the State has blocked this proposed reform. Even for amicus Representative Alan Lowenthal, who played a significant role in California's transition to an independent commission, the path to that result was long, difficult, and beset by partisan opposition from his own party.[46]

There must be basic limits on the ability of majorities to gerrymander for purely partisan gain. The health of the House, especially its ability to serve the People with clear-eyed independence, as the Framers intended, depends on it.

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[44] *E.g.*, Lapowsky, *Good News: Midterm Voters Drew the Line on Gerrymandering*, Wired (Nov. 7, 2018).

[45] Duncan, *Group seeks to change redistricting*, The Southern Illinoisan (Mar. 23, 2014).

[46] *See* Ingraham, *One easy way to end gerrymandering: Stop letting politicians draw their own districts*, Wash. Post (June 2, 2014).

## II. Extreme Gerrymandering Is Inconsistent With The Nature Of Representation In Our Form Of Government

The Framers gave the House of Representatives a special and critical role: to be the authentic voice of the People. They intended Members of the House and the communities they serve to share strong bonds. Extreme partisan gerrymandering is inconsistent with these basic principles on which our government was founded.

### A. Members Of The House Are Direct Representatives Of The People

The Framers conceived of a government in which institutions would reflect different forms of political authority. *See* Federalist No. 40 (Madison); *see also, e.g.*, Wood, *The Creation of the American Republic 1776-1787*, at 553-562 (1998). The President and the Senate, each indirectly elected to lengthy terms, were meant to reflect aspects of constitutional monarchy and aristocracy, respectively. *Id.*[47] But the House, then as now, was to be the bastion of democracy—"the grand depository of the democratic principle of the Gov[ernmen]t," as George Mason put it, 3 *The Records of the Federal Convention of 1787*, at 48 (Farrand ed. 1911) ("Farrand").

The House's direct connection to the People was designed to be its essential quality. As the Court explained a generation ago, "[t]he House of Representatives ... was to represent the people as individuals, and on the basis of complete equality for each voter." *Wes-*

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[47] Originally, the Constitution provided for Senators to be chosen by state legislatures rather than by the People. *See* U.S. Const. art. I, § 3, cl. 1. Direct election of Senators was not permitted until ratification of the 17th Amendment in 1913.

*berry* v. *Sanders*, 376 U.S. 1, 14 (1964). That direct connection is so vital because, in our constitutional order, "all political power flows from the people." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) ("*AIRC*"); *see also, e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803, 821 (1995) (Framers created "a Federal Government directly responsible to the people"); *id.* at 839 (Kennedy, J., concurring) ("A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it."); *McCulloch* v. *Maryland*, 17 U.S. 316, 404 (1819) ("[W]hen ... it was deemed necessary to [bring forth] an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."); *accord* U.S. Const., Preamble ("We the People of the United States ... do ordain and establish this Constitution for the United States of America.").

The Framers repeatedly emphasized their vision of a House of Representatives that was close to the People, directly responsive to them through the mechanism of frequent and broad-based elections, and thus capable of giving them a powerful voice in the Nation's decision-making. "'Who are to be the electors of the Federal Representatives?' Madison asked. "Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States." Federalist No. 57 (Madison); *see also* Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, in 1 *The Founders' Constitution* 252

(House members are the "immediate Representatives of the People"); 2 *Debates on the Federal Constitution* 28-29 (J. Elliot ed., 1876) ("*Elliot's Debates*") ("The federal representatives will represent the people; they will be the people.") (J.C. Jones) (Mass.).

The Framers built these principles into the structure of Article I. They provided for direct elections for the House "by the People of the several States" every two years. U.S. Const. art. I, § 2, cl. 1. They ensured that apportionment of House seats would be done "according to [the People's] respective numbers" in the States, *id.* cl. 3. And they provided that any person who could vote for "the most numerous Branch of the State Legislature" would be eligible to vote in elections for the House as well. *Id.* cl. 1.

Frequent, broad-based elections are designed to create a "direct line of accountability between the National Legislature and the people who elect it," conceived as broadly as possible. *Cook* v. *Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring). In the Framers' thinking, it was "particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people." Federalist No. 52 (Madison). Competitive elections were "unquestionably the only policy by which this dependence and sympathy can be effectually secured." *Id.* Those in power, Madison explained, were to "be kept in dependence on the people" as a matter of "republican liberty." Federalist No. 37.

Notably, the People's representation in the House was to serve one of the fundamental goals of our constitutional structure: elimination of excessive faction. *See* Federalist No. 10 (Madison).

One imperative is thus clear from both the Framers' statements and the constitutional design they es-

tablished: The role of the House in our constitutional order—to reflect the will of the People—depends on the electoral relationship between Members and the People. The People's ability to choose their representatives was an essential guarantee of both popular sovereignty and liberty. The Framers' concerns resonate across the centuries—and amici feel them every day as part of our lived experience.

### B. Extreme Gerrymandering Distorts The People's Voice In Contravention Of The Framers' Vision

Extreme partisan gerrymandering threatens the Framers' vision of a directly accountable national legislature.

The Framers envisioned frequent, broad-based, competitive House elections that would create a relationship of "dependence" and tie House Members closely to the People. The entire point of extreme gerrymandering is to undercut that tie in order to achieve a narrow partisan political result. *See, e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 537-538 (1969) (Fortas, J., concurring) (describing "gerrymandering" as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes").

The Framers themselves repeatedly expressed concern that, through the manipulation of electoral districts, "the House of Representatives should not really represent the people," thereby undermining the republican character of the nascent government. *E.g.*, 4 *Elliot's Debates* 303 (C. Pinckney); *accord* 3 *Elliot's Debates* 367 (Madison) (warning that improper "unequal" apportionment could "deprive[]" the people of "the right of suffrage"). They knew that, without some external check,

the rules of the political process could be manipulated.[48] Their concern on this point makes sense in light of their overall project, for "'the true principle of a republic is, that the people should choose whom they please to govern them.'" *Powell* v. *McCormack*, 395 U.S. 486, 540-541 (1969) (quoting 2 *Elliot's Debates* 257 (Hamilton)).

This Court has described extreme gerrymandering as incompatible with this fundamental principle of our form of government. Extreme gerrymandering turns the "true principle" of our Republic on its head, permitting politicians to choose the people whom they represent rather than the reverse. *See AIRC*, 135 S. Ct. at 2677 (noting "the core principle of republican government ... that the voters should choose their representatives, not the other way around" (internal quotation marks omitted)) (quoting Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)). Partisan gerrymanders "[are incompatible] with democratic principles." *AIRC*, 135 S. Ct. at 2658 (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (Scalia, J.) (plurality opinion) and citing *id.* at 316 (Kennedy, J., concurring in judgment)). They threaten the very notion of a representative government, in which, through the mechanism of broad-based popular elections, "legislatures ... should be bodies which are collectively responsive to the popular will." *Reynolds* v. *Sims*, 377 U.S. 533, 565-566 (1964).

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[48] *Compare* Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1053-1054 (2005) ("[B]ecause gerrymanders involve the rigging of elections themselves, the regular political process is not entirely trustworthy in policing them") *with* Federalist Nos. 56 & 57 (Madison) (discussing rotten borough and pocket borough representatives in Parliament as overcome by faction due to structural defects, and asserting that broad elections by the whole People would remedy such defects).

This is not to say that politics has no place in districting. Far from it. It is an inescapable fact that "the location and shape of districts" can determine "the political complexion of the area." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Some variation in the shape of districts is natural, so long as those variations "are based on legitimate considerations incident to the effectuation of a rational state policy," such as keeping towns, counties, or cohesive political communities together. *E.g.*, *Reynolds*, 377 U.S. at 579.

But true representation, consistent with the special role of the House as the voice of the People, is diminished when district lines are designed to insulate Representatives from the People and instead to achieve a preordained, partisan result. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."). Extreme partisan gerrymandering impedes the "direct link" between the People and their representatives in the House that the Framers intended, *Thornton*, 514 U.S. at 803.

## III. Recognizing Basic Limits On Extreme Partisan Gerrymandering Is Appropriate And Consistent With The Court's Role In Our Constitutional Order

Because extreme partisan gerrymandering works to skew a zero-sum districting process, there are few political incentives that can entice a dominant party in a given state to end the practice. The problem is thus uniquely difficult to fix through the regular functioning of the political process.

Action by this Court, to recognize constitutional limits on hyper-partisan gerrymandering, is both essential and in keeping with the Court's role in our constitutional order. The Court can do so without becoming entangled in endless political disputes; indeed, merely articulating an outer boundary on the most extreme gerrymanders will do much to jumpstart corrective measures from within the political process itself.

### A. Extreme Partisan Gerrymandering Represents A Breakdown In The Political Process

Members of this Court and others have repeatedly expressed the concern that partisan gerrymanders distort the electoral process and result in the "frustration of the will of a majority of the voters." *E.g.*, *Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986) (plurality op.); *accord AIRC*, 135 S. Ct. at 2677. Partisan gerrymanders are also politically self-insulating. If a gerrymander is done effectively, voters will find it difficult or impossible to punish the political party that carried out the gerrymander, even if the decision to distort the political process is profoundly unpopular.[49]

This self-insulating quality means that, as gerrymanders become more effective, the "temptation to use partisan favoritism in districting in an unconstitutional manner will grow." *Vieth*, 541 U.S. at 312 (Kennedy, J.,

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[49] *See* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1328-1329 (1987) (partisan gerrymandering is "not merely [a] consequence[] of constitutionally suspect politics" but also a "fundamental *cause*[] of it").

concurring).[50] And, aided by technology, partisan gerrymandering has become far more effective in recent years.[51] *See, e.g.*, *Gill* v. *Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past.").[52]

This Court has long recognized its role in ensuring the proper functioning of the political process. *See, e.g.*, *Schuette* v. *Coalition to Defend Affirmative Action*, 572 U.S. 291, 312 (2014) (describing the right of citizens, "through the political process, [to] act in concert to try to shape the course of their own times and the course of a nation"); *see also, e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) (political rights are "fundamental" because they are "preservative of all rights"). The Court has accordingly identified breakdowns in the operation of the political process as warranting judicial intervention. *See, e.g.*, *LULAC*, 548 U.S. at 440 (redistricting measures that "'hinder[ed] [certain groups'] ability to participate effectively in the political process'" were impermissible); *see also, e.g.*, *Colorado Republican Fed.*

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[50] *See also, e.g.*, Aguilera, *Drawing the Line:* Whitford *v.* Gill *and the Search for Manageable Partisan Gerrymandering Standards*, 86 U. Cin. L. Rev. 775, 777-778 (2018).

[51] *E.g.*, Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L. J. 2505, 2516 (1997) (late-twentieth-century gerrymandering was more extreme than gerrymandering in previous decades); *see also, e.g.*, *Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (per curiam) (due to redistricting software, maps that once took months to prepare could be generated in a matter of hours).

[52] While a few states have used the initiative and referendum to enact districting reforms in recent years, such efforts still face significant political headwinds, *see supra* p. 24—and they are not even possible in the majority of states that lack the initiative and referendum to begin with.

*Campaign Comm.* v. *FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J. concurring in the judgment and dissenting in part) ("What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 n.16 (1983) ("[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the ... rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny."); *see also generally United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (greater judicial scrutiny required where legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").[53] Extreme partisan gerrymandering is akin to other breakdowns in the electoral process that the Court has identified as calling for judicial action. *See, e.g., Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" (quoting *Carolene Prods.*, 304 U.S. at 153 n. 4)); *see also, e.g., LULAC*, 548 U.S. at 423-443 (discussing the use of gerrymandering to stymie the increasing electoral power of one growing ethnic group in violation of Voting Rights Act).

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[53] *See also* Ely, *Democracy and Distrust: A Theory of Judicial Review* 106 (1980) ("Courts must police inhibitions on ... political activity because we cannot trust elected officials to do so[.]").

### B. Basic Limits Are All That Is Needed To Resolve The Breakdown

Until now, legislative map-makers have had no political incentive to police their own excesses, and no standard by which to do so. Articulation of a constitutional outside limit in this area will force map-drawers to curb the worst excesses and thus prevent some litigation before it starts. Recent events in Colorado exemplify this dynamic. There, partisan warfare and judicial intervention into the redistricting process in the wake of the 2010 census culminated in the imposition of a judge-drawn map, which in turn led both parties to support creation of an independent commission.[54] This Court need not craft a comprehensive legal standard that resolves all potential partisan gerrymandering challenges. Even minimal guidance will provide impetus for restraint.[55]

Amici do not favor frequent or extensive judicial intervention in the political process; indeed, amici appreciate this Court's historical reluctance to enter the "political thicket" surrounding redistricting. *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946) (plurality opinion); *see also Vieth*, 541 U.S. 267 (2004) (plurality opinion). But in light of the constitutional principles that animate our role as Members of the House, and the grave threat that hyper-partisan gerrymanders poses to our Republic, we need constitutional ground rules that ensure

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[54] *See* Brasch, *Anti-Gerrymandering Effort Sails Through The Colorado Capitol On Its Way To The Ballot*, Colorado Public Radio (May 7, 2018).

[55] Indeed, while all amici agree that some constitutional boundaries are essential to police the growing negative effects of partisan gerrymandering, amici take no position on the effectiveness of the different specific legal tests that might be used for enforcing such boundaries.

basic standards of fairness and broad-based competition. That is possible without subjecting the districting process to judicial second-guessing. Intervening, in a measured way, to address a breakdown in the political process, is entirely consistent with the Court's role in our constitutional order.[56]

Recognizing basic constitutional limitations on partisan gerrymandering will encourage political parties and voters to change course and enable them to mend the broken parts of our political process. This Court should give the Nation that chance.

## CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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[56] *See, e.g.*, Charles & Fuentes-Rohwer, *Judicial Intervention As Judicial Restraint*, 132 Harv. L. Rev. 236, 256 (2018) (suggesting that the Court's categorical noninvolvement in partisan gerrymandering cases will signal to political elites and the mass public that the Court has taken a side in the political debate over the issue).